

# **2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE**

## **CHAPTER 1**

### **JURISDICTION**

#### **Table of Contents**

<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. JURISDICTION OVER THE OFFENSE.....</b>	<b>4</b>
<b>III. JURISDICTION OVER THE PERSON. ....</b>	<b>5</b>
<b>IV. COURT-MARTIAL JURISDICTION OVER THE RESERVE COMPONENTS.....</b>	<b>15</b>
<b>V. PROCEDURAL CONSIDERATIONS.....</b>	<b>17</b>
<b>VI. APPELLATE JURISDICTION. ....</b>	<b>17</b>
<b>VII. CONCLUSION. ....</b>	<b>19</b>

**MAJ Tyler Harder  
December 2000**



# **2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE**

## **JURISDICTION**

### **Outline of Instruction**

#### **I. INTRODUCTION.**

Jurisdiction means the power of a court to try and determine a case, and to render a valid judgment. Courts-martial are courts of special and limited jurisdiction. For example, courts-martial jurisdiction applies worldwide, but is limited in application to a certain class of people—members of the armed forces. In general, three prerequisites must be met in order for courts-martial jurisdiction to vest. They are: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.

Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense, or the status of the accused at the time of trial. These issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (personal jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense. If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a servicemember at the time the offense is committed, subject matter jurisdiction is satisfied. Personal jurisdiction, however, focuses on the time of trial: can the government court-martial him? The answer is yes, so long as the accused has proper status, i.e., that the accused is a servicemember at the time of trial.

##### **A. Sources of Jurisdiction.**

1. The Constitution: Article I, section 8, clause 14
2. UCMJ, articles 2, 3 and 36
3. MCM, 1995 ed., RCM 201 - 204
4. Customary international law and treaties

B. Five Elements of Court-Martial Jurisdiction, R.C.M. 201(b):

1. Jurisdiction over the offense (subject-matter jurisdiction).
2. Jurisdiction over the person (personal jurisdiction).
3. Court properly composed (military judge and members must have proper qualifications).
  - a. *United States v. Townes*, 52 M.J. 275 (2000). Staff Sergeant Townes was convicted by a general court-martial composed of enlisted and officer members. The record is clear that he did not personally request, either orally or in writing, that enlisted members serve on his court-martial (as required by Article 25(c)(1)); rather, the trial defense counsel made the election on his behalf. Relying on precedent (*United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985)), the Navy-Marine Court refused to apply a “substantial compliance analysis” and held that the error in forum election was jurisdictional. The CAAF reversed, holding that the military judge erred in failing to elicit the accused’s personal selection on the record, but that there was substantial compliance with the requirements of Article 25. “There was sufficient indication by [accused] orally and on the record that he personally requested enlisted members. Accused had been advised of his rights concerning the forum . . . defense counsel [noted accused’s desire] to be tried by . . . panel . . . [Accused] testified for an entire day before the court members.” The error did not materially prejudice the substantial rights of the accused.
  - b. *United States v. Turner*, 47 M.J. 348 (1997). Absent evidence of coercion or ineffective assistance of counsel, accused’s request to be tried by military judge alone can be inferred from the record of trial. Defense counsel, not the accused, represented for the record, both orally and in writing, that the accused elected to be tried by military judge alone. Even though the accused did not personally make the request, considering the facts in the case, there was substantial compliance to satisfy UCMJ, art 16.

- c. *United States v. Seward*, 48 M.J. 369 (1998). Failure to formally request trial by military judge alone prior to assembly was error. However, under the facts of the case, the error was not prejudicial. The accused did not request to be tried by military judge alone until after completion of the sentencing proceedings. The court found that the accused's desire to be tried by judge alone was apparent by the terms of the pre-trial agreement (an agreement to be tried by military judge alone) and the post-assembly written submission to be tried by judge alone.
  - d. *United States v. Cook*, 48 M.J. 434 (1998). The court-martial did not lack jurisdiction even though there were substitute members detailed to the court-martial who replaced excusals beyond the one-third excusal limitation. Prior to assembly, the SJA excused more than one-third of the total number of members originally detailed. The Convening Authority in turn detailed substitute members to the panel. The court held that the members detailed in excess of the one-third excusal limitation under R.C.M. 505(c)(1)(B)(ii) were not "interlopers" and did not deprive the court-martial of jurisdiction.
  - e. *United States v. Sargent*, 47 M.J. 367 (1997). The unexplained absence of a detailed member did not deprive the general court-martial of jurisdiction over the accused so long as the statutory quorum was satisfied.
4. Convened by proper authority.

A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), set aside, on other grounds, 36 M.J. 8 (C.M.A. 1992); accord *United States v. Randle*, 35 M.J. 789 (A.C.M.R. 1992). See also *United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996).

5. Charges properly referred.
  - a. *United States v. Underwood*, 47 M.J. 805 (A.F. Ct. Crim. App. 1997). Issues of an improper referral for trial are not jurisdictional in nature. It was not an improper purpose to withdraw and re-refer charges to another court-martial because of witness availability.
  - b. *United States v. Pate*, 54 M.J. 501 (A.C.C.A. 2000). The accused was charged with violating Art. 92(2), failure to obey a lawful order, and pursuant to his proposed pleas in a pretrial agreement, plead guilty by exceptions and substitutions to Art. 92(3), negligent dereliction of duty. The PTA was not signed by the GCMCA, but instead the word "accepted" was circled and a notation made indicating a voco to the SJA. The accused argued that since the CA never signed the PTA, the new charge was never referred and, therefore, the court-martial lacked jurisdiction over that charge. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing and the lack of signature was "insignificant."

## II. JURISDICTION OVER THE OFFENSE.

### A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The "service-connection" test is established.
2. *Solorio v. United States*, 483 U.S. 435 (1987). The Supreme Court overrules *O'Callahan*, abandoning the "service-connection" test, and holds that jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces.

- B. **BOTTOM LINE:** Subject matter jurisdiction is established by showing military status at the time of the offense.

- C. **Administrative Double Jeopardy Policies.** Generally, a member of the Armed Forces will not be tried by court-martial or punished under Article 15, UCMJ, for the same act for which a civilian court has tried the soldier. This policy is based on comity between the federal government and state or foreign governments. See AR 27-10, para. 4-2; JAGMAN, para. 0124.
  
- D. **Capital Cases:** *Loving v. United States*, 517 U.S. 748 (1996). Justice Stevens (concurring) raises the question of whether a “service connection” requirement applies to capital cases. See also *United States v. Simoy*, 46 M.J. 601 (A.F.Ct.Crim.App. 1996) (a capital murder case in which the court made a specific finding that the felony murder was “service-connected”). See also *United States v. Gray*, 51 M.J. 1 (1999).
  
- E. **Subject Matter Jurisdiction Over Reservists/National Guard:** The offense must be committed while the reservist has military status. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). But see *United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993). See also *United States v. Smith*, Case No. 9500065, unpub. (Army Ct. Crim. App. 1998) (holding there was no court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).

### III. JURISDICTION OVER THE PERSON.

- A. General Provisions: UCMJ, art. 2, provides jurisdiction over categories of persons with military status:

- 1. Enlistees; Inductees; Academy Cadets/Midshipmen
  
- 2. Retirees.

TJAG approval is required before prosecuting retirees. Failure to follow “policy” and obtain OTJAG approval to try a retiree, however, is not jurisdictional error. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992). Jurisdiction over retirees is constitutional. *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).

- 3. Persons in custody

4. P.O.W.'s
  5. Persons accompanying or serving with the armed forces in the field in time of war.
  6. Reservists.
- B. **General Rule:** In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order. Court-martial jurisdiction ends upon delivery of a valid discharge certificate.
- C. Inception of Court-Martial Jurisdiction.
1. **Enlistment:** A Contract Which Changes "Status." UCMJ, art. 2(b).
 

(B) THE VOLUNTARY ENLISTMENT OF ANY PERSON WHO HAS THE CAPACITY TO UNDERSTAND THE SIGNIFICANCE OF ENLISTING IN THE ARMED FORCES SHALL BE VALID FOR PURPOSES OF JURISDICTION UNDER SUBSECTION (A) OF THIS SECTION, AND A CHANGE OF STATUS FROM CIVILIAN TO MEMBER OF THE ARMED FORCES SHALL BE EFFECTIVE UPON THE TAKING OF THE OATH OF ENLISTMENT.
  2. **Involuntary enlistment:** *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (coercion); *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978); and *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution -no coercion).



3. **Constructive Enlistment.** The codification of *In Re Grimley*, 137 U.S. 147 (1890). UCMJ, art. 2(c) (as amended in 1979):

(C) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A PERSON SERVING WITH AN ARMED FORCE WHO—

(1) SUBMITTED VOLUNTARILY TO MILITARY AUTHORITY;

(2) MET THE MENTAL COMPETENCE AND MINIMUM AGE QUALIFICATIONS OF SECTIONS 504 AND 505 OF THIS TITLE AT THE TIME OF VOLUNTARY SUBMISSION TO MILITARY AUTHORITY;

(3) RECEIVED MILITARY PAY OR ALLOWANCES;  
AND

(4) PERFORMED MILITARY DUTIES;

IS SUBJECT TO THIS CHAPTER UNTIL SUCH PERSON'S ACTIVE SERVICE HAS BEEN TERMINATED IN ACCORDANCE WITH LAW OR REGULATIONS PROMULGATED BY THE SECRETARY CONCERNED.

D. Termination of Jurisdiction Over the Person.

1. **General Rule:** Discharge Terminates Jurisdiction.

2. ETS/EAS by itself does not terminate jurisdiction.

- a. RCM 202(a) discussion: "Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction . . . court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention."

- b. *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). Jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—by the government in discharging that person at the end of an enlistment. Even if the member objects, it is immaterial—the significant fact is that the member has yet to receive a discharge. Caveat: Unreasonable delay may provide a defense to “some military offenses.”
  - c. RCM 202(b): “Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges.” See *United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988).
  - d. *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995). Focusing investigation on accused as prime suspect is enough to establish a “view towards trial” and preserve military jurisdiction beyond ETS/EAS. The court cites to apprehension, imposition of restraint, and preferral of charges as other actions, which attach court-martial jurisdiction, i.e., indicate a “view towards trial.”
  - e. **Appellate Leave.** *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave, was not provided discharge due to governmental delay in executing punitive discharge).
3. When is discharge effective?
- a. **On delivery.** *United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (1960).

- b. **Valid Discharge Certificate:** Discharge Authority's Intent. Early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when certificate is clear on its face that the commander did not intend the discharge to take effect until later. *United States v. Batchelder*, 41 M.J. 337 (1994). *See also United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).
- c. **Final accounting of pay.** *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay).
- d. **Undergo a clearing process.** *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (sailor refused to complete re-enlistment ceremony after he received a discharge certificate). Three elements per King to effectuate an early discharge:
  - (1) Delivery of a valid discharge certificate;
  - (2) A final accounting of pay; and
  - (3) Undergoing a "clearing" process as required under appropriate service regulations to separate the member from military service.

*See also United States v. King*, 37 M.J. 520 (A.C.M.R. 1993).

- e. **At 2400 hours on date of discharge.** *United States v. Melanson*, 53 M.J. 1 (2000). The accused, who was stationed in Germany, became a possible suspect in an assault investigation while he was being administratively separated for drug use. On 20 May 1998, the day he was to fly from Germany, eyewitnesses to the assault identified the accused as the attacker. The accused had already cleared his unit and received a copy of his DD 214 (discharge certificate). Upon the discovery that the accused was the prime suspect, the command revoked the accused's separation orders and apprehended him at the airport. CAAF held that *in personam* jurisdiction still existed because pursuant to AR 635-200, **a discharge takes effect at "2400 hrs. on the date of notice of discharge to the soldier"** and the discharge was therefore not yet effective. *See also, United States v. Williams*, 53 M.J. 316 (2000).
4. **Erroneous Delivery.** Erroneous delivery will not terminate jurisdiction. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988) (premature delivery of a BCD certificate); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987) (early delivery of discharge, in violation of Navy regulations, meant discharge was not effective on receipt).
5. **Post-arraignment Discharge.** A valid discharge of a soldier prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge. *Smith v. Vanderbush*, 47 M.J. 56 (1997). In personam jurisdiction was lost when accused was discharged after arraignment but before lawful authority resolved the charges. The court considered the intent of the discharge authority and found that there was no evidence to show that the discharge authority (not CA) did not intend to discharge accused on his ETS. In determining a valid discharge the court considered: 1) delivery of discharge certificate; 2) final accounting of pay; and 3) intent of discharge authority.

6. **Post-conviction Discharge.** *Steele v. Van Riper*, 50 M.J. 89 (1999). After a court-martial conviction, but before the convening authority took action, the government honorably discharged the accused. When the convening authority finally took action, he approved the findings and sentence (which included a punitive discharge), declared that the honorable discharge was erroneous, and placed the accused in an involuntary appellate leave status. The accused challenged the invalidation of his honorable discharge. In a supplemental brief, the government concurred. As such, the CAAF denied the accused's writ-appeal, but advised that the honorable discharge does not affect the power of the convening authority or appellate tribunals to act on the findings and sentence.
7. **Execution of Punitive Discharge.** *United States v. Keels*, 48 M.J. 431 (1998). Promulgation of a supplemental court-martial convening order that ordered executed a punitive discharge does not terminate court-martial jurisdiction. Even when there is a punitive discharge, jurisdiction does not terminate until delivery of the discharge certificate and final accounting of pay. There is not instantaneous termination of status upon completion of appellate review.
8. **Post-Appeal Discharge.** *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days (a CAAF rule), the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF held that jurisdiction existed notwithstanding execution of a punitive discharge under Article 71, and it was only a question of whether to consider the case under direct review or collateral review.

9. Exceptions to General Rule that Discharge Terminates Jurisdiction.

a. **Exception:** UCMJ, art. 3(a).

(A) [A] PERSON WHO IS IN A STATUS IN WHICH THE PERSON IS SUBJECT TO THIS CHAPTER AND WHO COMMITTED AN OFFENSE AGAINST THIS CHAPTER WHILE FORMERLY IN A STATUS IN WHICH THE PERSON WAS SUBJECT TO THIS CHAPTER IS NOT RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR THAT OFFENSE BY REASON OF A TERMINATION OF THAT PERSON'S FORMER STATUS.

*Willenbring v. Neurauter*, 48 M.J. 152 (1998). The CAAF holds that under the 1986 version of Article 3(a), UCMJ, court-martial jurisdiction exists to prosecute a member of the reserve component for misconduct committed while a member of the active component so long as there has not been a complete termination of service between the active and reserve component service. In dicta, however, the CAAF advises that the current version of Article 3(a), UCMJ, “clearly provides for jurisdiction over prior-service offenses without regard to a break in service.” *But see Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (holding that it is improper to involuntarily recall a member of the reserve component to active duty for an Article 32(b) investigation when the alleged misconduct occurred while the service member was a member of the active component).

b. **Exception:** UCMJ, art. 3(b), person obtaining a fraudulent discharge.

(B) EACH PERSON DISCHARGED FROM THE ARMED FORCES WHO IS LATER CHARGED WITH HAVING FRAUDULENTLY OBTAINED HIS DISCHARGE IS . . . SUBJECT TO TRIAL BY COURT-MARTIAL ON THAT CHARGE AND IS AFTER APPREHENSION SUBJECT TO THIS CHAPTER WHILE IN THE CUSTODY OF THE ARMED FORCES FOR THAT TRIAL. UPON CONVICTION OF THAT CHARGE HE IS SUBJECT TO TRIAL BY COURT-MARTIAL FOR ALL OFFENSES UNDER THIS CHAPTER COMMITTED BEFORE THE FRAUDULENT DISCHARGE.

- (1) *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). May the government prosecute a soldier whose delivered discharge (Chapter 8 - pregnancy) was revoked for being obtained by fraud? C.M.A. allowed the court-martial proceedings to continue. The 5th Circuit affirmed the district court's denial of Wickham's request for habeas corpus relief. The court-martial may proceed. *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).
- (2) *United States v. Reid*, 46 M.J. 236 (1997). The government must secure a conviction for fraudulent discharge prior to prosecuting the accused for other offenses. Article 3(b) clearly requires a two-step trial process. QUERY: What about offenses committed after the fraudulent discharge? Article 3(b) does not confer jurisdiction over offenses committed after the fraudulent discharge. The service court, in dicta, reasoned that after conviction for the fraudulent discharge, jurisdiction would exist over offenses committed after the discharge under UCMJ, art. 2.
- (3) *United States v. Pou*, 43 M.J. 778 (A.F.Ct.Crim.App. 1995). Declaring a missing person "dead" is not the equivalent of a discharge of that person, therefore, art. 3(b) is inapplicable, and court-martial jurisdiction exists.

c. **Exception:** UCMJ, art. 3(c), deserter obtaining discharge for subsequent period of service.

(C) NO PERSON WHO HAS DESERTED FROM THE ARMED FORCES MAY BE RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER BY VIRTUE OF A SEPARATION FROM ANY LATER PERIOD OF SERVICE.

- d. **Exception:** UCMJ, art. 2(a)(7), persons in custody of the armed forces serving a sentence imposed by court-martial. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (prosecuted after BCD executed but still in confinement).

(A) THE FOLLOWING PERSONS ARE SUBJECT TO THIS CHAPTER:

(7) PERSONS IN CUSTODY OF THE ARMED FORCES SERVING A SENTENCE IMPOSED BY A COURT-MARTIAL.

- e. **Exception:** UCMJ, art. 3(d), leaving a Title 10 status does not terminate court-martial jurisdiction.

(D) A MEMBER OF A RESERVE COMPONENT WHO IS SUBJECT TO THIS CHAPTER IS NOT, BY VIRTUE OF THE TERMINATION OF A PERIOD OF ACTIVE DUTY OR INACTIVE-DUTY TRAINING, RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR AN OFFENSE AGAINST THIS CHAPTER FOR AN OFFENSE AGAINST THIS CHAPTER COMMITTED DURING SUCH PERIOD OF ACTIVE OR INACTIVE-DUTY TRAINING.

- E. ***In Personam Jurisdiction in a Foreign Country.*** *United States v. Murphy*, 50 M.J. 4 (1998). The accused was convicted of premeditated murder and sentenced to death for murders he committed while stationed in Germany. The accused challenged the jurisdiction of the court-martial. He argued that the military investigators misled the German Government to believe that the United States had primary jurisdiction of the case under the NATO SOFA. Based on this information, the German Government waived its jurisdiction. Had the German Government asserted jurisdiction, the accused could not have been sentenced to death because the Constitution of Germany prohibits the death penalty. The CAAF held that the accused lacked standing to object to which sovereign prosecuted the case. The important jurisdictional question to answer is, Was the accused in a military status at the time of the offense and at the time of trial? The court found that the accused was. The case was set aside and remanded on other grounds.



#### IV. COURT-MARTIAL JURISDICTION OVER THE RESERVE COMPONENTS.

- A. Historical Overview.
- B. **BOTTOM LINE:** Reserve Component soldiers are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD).
- C. When does jurisdiction exist for IDT individual?
  - 1. Compare UCMJ, art. 2, to service regulations defining IDT.
  - 2. Compare to ADT. *See United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), cert. denied, 493 U.S. 1045 (1990).
  - 3. *United States v. Wall*, 1992 CMR LEXIS 642 (A.F.C.M.R. 1992) (not reported in M.J.).
- D. UCMJ, art. 3(d). Prevents the termination of court-martial jurisdiction over a member of a Reserve Component who violates the UCMJ while in a Title 10 status by the member's release from active duty or inactive-duty training. Closes jurisdiction gaps recognized by *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984) and *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).
- E. Involuntary Recall to Active Duty. UCMJ, art. 2(d), authorizes a member of a Reserve Component, who is the subject of proceedings under Articles 15 or 30, UCMJ to be ordered involuntarily to active duty for:
  - 1. Article 32 investigation.
  - 2. Trial by court-martial.
  - 3. Nonjudicial punishment.

F. Restrictions on the involuntary recall process.

1. A member may only be ordered to active duty by an active component general court-martial convening authority (GCMCA). UCMJ, art. 2(d)(4); AR 27-10, para. 21-3.
2. Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:
  - a. sentenced to confinement;
  - b. forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or
  - c. placed in pretrial confinement. UCMJ, art. 2(d)(5).
3. General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).
4. Summary Courts-Martial. Can be initiated and tried within the reserve structure and without active duty involvement. R.C.M. 204(b)(2). But the summary court-martial officer must be placed on active duty. UCMJ, art. 25; R.C.M. 1301.

G. Impact on the National Guard.

1. 32 U.S.C. § 505 - Training in a state status - No jurisdiction.
2. 10 U.S.C. § 672 - Training in a federal status - Guard member is subject to jurisdiction and the reserve jurisdiction legislation's major provisions. This includes involuntary recall.
3. Federal status continues until the guard member has completed his period of federal service (excluding AWOL time) and federal jurisdiction exists notwithstanding a state termination of jurisdiction. *United States v. Wilson*, 53 M.J. 327 (2000).

## V. PROCEDURAL CONSIDERATIONS.

- A. Pleading Jurisdiction. *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977).
- B. Lack of Jurisdiction: Raised by Motion to Dismiss, R.C.M. 907. May be made at any stage of the proceeding.
- C. Burden of Proof:
  - 1. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c)(preponderance); R.C.M. 905(c)(2)(B) (burden of persuasion on government).
  - 2. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for “peculiarly military” offenses like AWOL, an accused’s military status is an element of the offense which must be proved beyond a reasonable doubt to the fact finders).

## VI. APPELLATE JURISDICTION: THE ALL WRITS ACT, 28 U.S.C. § 1651(A).

- A. **Introduction.** In 1948, Congress enacted the All Writs Act, which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. The All Writs Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In 1969, the Supreme Court held that the All Writs Act applied to our military appellate courts. *Noyd v. Bond*, 395 U.S. 683 (1969). Consistent with federal courts, our military appellate courts view writ relief as a drastic remedy that should only be invoked in those situations that are truly extraordinary.

B. ***Writ Authority in the Military.***

1. *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999). The government involuntarily recalled the accused (a member of the retired reserves) to active duty to face a court-martial. At trial, the accused challenged the jurisdiction of the court-martial. The military judge denied the accused's motion, and the accused petitioned the Air Force Court seeking an extraordinary writ ordering the military judge to dismiss all charges and specification. The service court held that it had jurisdiction under the All Writs Act to hear the issue and denied the accused's relief. In denying the writ, the court found that the accused was a member of retired reserves, which made him part of the reserve component and subject to lawful orders to return to active duty. Since the accused was in an active duty status at the time of trial, the court-martial did not lack *in personam* jurisdiction.
2. *Clinton v. Goldsmith*, 143 L.Ed.2d 720 (1999). The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the rolls of the Air Force. The Supreme Court held that the CAAF lacked jurisdiction, under the All Writs Act, to issue the injunction in question because, (1) the injunction was not "in aid of" the CAAF's strictly circumscribed jurisdiction to review court-martial findings and sentences; and (2) even if the CAAF might have had some arguable basis for jurisdiction, the injunction was neither "necessary" nor "appropriate," in light of the alternative federal administrative and judicial remedies available, under other federal statutes, to a service member demanding to be kept on the rolls.

3. *United States v. Byrd*, 53 M.J. 35 (2000). The accused petitioned the court, asking review of an ineffectiveness of counsel claim. Unfortunately for the accused, he filed the petition after the government executed his sentence, which included a punitive discharge. Despite the execution of his discharge, the accused petitioned CAAF for review, and review was granted (government did not offer lack of jurisdiction or untimely filing as reasons to deny review). Two years later, and after the case had been remanded to the NMCCA for further consideration, the government requested that appellate review be terminated for lack of *in personam* jurisdiction. The NMCCA held that jurisdiction for continued review ended following the proper execution of the discharge in 1997. CAAF held that the NMCCA erred in concluding that accused's discharge was proper under Article 71. CAAF stated "this Court has jurisdiction to review such a case under the All Writs Act," but declined to decide which standard of review was more appropriate, direct or collateral.

## **VII. CONCLUSION.**

